Vet. App. No. 16-0049

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

LAWRENCE G. SKOTNIK
Appellant,

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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	)	
Appellant	)	
	)	
v.	)	Vet.App. No. 16-0049
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs	)	
	)	
Appellee	)	

ON APPEAL FROM
THE BOARD OF VETERANS' APPEALS

APPELLEE'S BRIEF

I. ISSUE PRESENTED

Whether the Court should affirm the November 24, 2015, decision of the Board of Veterans' Appeals (Board), which denied entitlement to service connection for a respiratory disorder, to include chronic obstructive pulmonary disease (COPD).

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The Court has proper jurisdiction pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Lawrence G. Skotnik (Appellant) appeals the November 24, 2015, decision of the Board, which denied his claim of entitlement to service connection for a

respiratory disorder, to include chronic obstructive pulmonary disease (COPD).[1] Appellant argues that the Board failed to comply with its duty to assist when it failed to provide him with a medical examination regarding the etiology of his COPD. (App. Br. at 1). He further contends that the Board failed to provide an adequate statement of reasons or bases for its decision not to seek such an opinion. (App. Br. at 1). However, Appellant's contentions fail to demonstrate the Board did not ensure compliance with the duty to assist or that the reasons and bases determined by the Board were inadequate.

C. Statement of Relevant Facts

Appellant served in the United States Army from June 1965 to June 1967, with additional service in the Army Reserves. (R. at 571). He had an exit medical examination in May 1967 and reported his health as good; no issues with asthma, shortness of brain, pain or pressure in chest or chronic cough were noted. (R. at 87-88). In September 1984, Appellant had an enlistment examination for the Army Reserves and reported his health as good; no issues with asthma, shortness of brain, pain or pressure in chest or chronic cough were noted. (R. at 78-79). Appellant had another enlistment examination in September 1988; his lungs or chest were evaluated as normal. (R. at 72-73). In Appellant's enlistment examination, in January 1992, he reported his health as good; no issues with asthma, shortness of brain, pain or pressure in chest or chronic

[1] The other issue on appeal was entitlement to service connection for arthritis but it was remanded and as such is not before this Court.

cough were noted. (R. at 31-32). In March 1997, Appellant had an enlistment examination and reported his health as good; no issues with asthma, shortness of brain, pain or pressure in chest or chronic cough were noted. (R. at 47-48).

On May 16, 2008, Appellant was seen for his annual physical and presented with a cough, congestion and shortness of breath. (R. at 448-450). The assessment/plan stated "MUST STOP SMOKING, discussed at length due to COPD and Acute Bronchitis." (R. at 450 (448-450)). (emphasis in original) Later that year, Appellant submitted a statement in support of claim seeking compensation for several issues including COPD. (R. at 544-545). In March 2009, he filed another statement in support of claim asserting that he, his spouse and his children's problems all "stemmed from herbicide used during Vietnam". (R. at 518 (517-518)).

A rating decision was issued in July 2009 which denied entitlement to service connection for chronic obstructive pulmonary disease as a result of exposure to herbicides stating:

> We sent you a letter and requested you to provide evidence which shows this condition is related to your military service, and evidence of treatment of the claimed condition from service to present, and evidence showing the claimed condition is a result of exposure to Agent Orange (herbicides), however, to date this evidence has not been received in this office. Based on all the evidence, we must deny your claim as secondary to exposure to herbicides and also on a direct service connected basis.

(R. at 388-389 (386-390)). Appellant filed his notice of disagreement in February 2010. (R. at 376 (376-382)). Six months later, he filed another statement in support of claim which stated "I claim that my medical problems could be linked

to agent orange exposure". (R. at 358-359). In December 2010, Appellant filed another statement in support of claim requesting compensation and pension (C & P) examinations. (R. at 285).

Another rating decision was issued in July 2011 which denied entitlement to service connection for chronic obstructive pulmonary disease (also claimed as breathing problems and viruses). (R. at 214-216 (206-218)). In October 2013, a statement of the case was issued denying entitlement for service connection for chronic obstructive pulmonary disease (also claimed as breathing problems and viruses) stating:

> The cited private treatment reports contain no evidence to show that chronic obstructive pulmonary disease (also claimed as breathing problems and viruses) was incurred in or caused by your military service. The cited VA treatment records document treatment for chronic obstructive pulmonary disease/emphysema but do not contain any evidence to show that this condition was incurred in or caused by your military service or that it is related to herbicide exposure. Without medical evidence of a current disability and medical evidence linking it to an injury or disease incurred in service, service connection is denied.

(R. at 173-174 (154-174)). A few weeks later, Appellant filed his appeal and declined a Board hearing. (R. at 65-68). Appellant contended that his case had been decided incorrectly because of an article he'd read regarding herbicide exposure which said "Vietnam Veterans may be carrying a germ of chronic Souteast [sic] Asian disease with after exposure that usually do not appear for a decade or longer the system of the disease can be treated with antibiotics." (R. at 66 (65-68)).

In November 2015, the Board issued a decision denying entitlement to service connection for a respiratory disorder, to include chronic obstructive pulmonary disease (COPD). (R. at 2-11). The present appeal followed.

III. SUMMARY OF ARGUMENT

This Court should affirm the November 24, 2015, decision of the Board, which denied entitlement to service connection for a respiratory disorder, to include chronic obstructive pulmonary disease (COPD). Appellant argues that the Board failed to comply with the duty to assist by not obtaining a medical opinion and likewise failed to provide adequate reasons and bases for its decision not to obtain a medical opinion. However, Appellant's contentions fail to demonstrate the Board did not ensure compliance with the duty to assist. He also fails to establish the Board provided a prejudicially inadequate statement of reasons or bases in its determination to deny his claim. As such, the Board's decision should be affirmed.

IV. ARGUMENT

APPELLANT FAILS TO PROVE THE BOARD DID NOT SATISFY ITS DUTY TO ASSIST BY FINDING THAT A MEDICAL OPINION WAS NOT REQUIRED OR THAT THE REASONS AND BASES FOR THAT DECISION WERE INADEQUATE.

The Secretary is required to "make reasonable efforts" to assist a claimant in obtaining evidence necessary to substantiate his or her claim for benefits. 38 U.S.C. § 5103A. This includes, among other things, a duty to provide a thorough and contemporaneous medical examination or obtain a

medical opinion when either is "necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); 38 C.F.R. § 3.159(c); *see also Green v. Derwinski*, 1 Vet.App. 121, 124 (1991); 38 C.F.R. § 3.326. The duty to assist requires the Secretary to provide a medical examination if there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability; (2) evidence that the an event, injury or disease occurred in service; (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the established in-service event, injury or disease or with another service-connected disability; and (4) there is insufficient competent medical evidence on which to decide the claim. *See* 38 C.F.R. § 3.159(c)(4). *See also McLendon v. Nicholson,* 20 Vet.App. 79, 85-86 (2006). Whether an examination is necessary requires the Board to take into consideration "all information and lay or medical evidence." 38 U.S.C. § 5103A(d)(2). The Court reviews the Board's determinations as to each of the factual prerequisites under the clearly erroneous standard and reviews *de novo* the ultimate legal question of whether, based on those factual determinations, a medical examination is required. *See* 38 U.S.C. § 7261(a)(3)(A); *McLendon,* 20 Vet.App. at 79-81.

In the present case, the Board considered the factors of *McLendon* and in respect to the third found:

> The Board concludes an examination and opinion with respect to the Veteran's claim for service connection for a respiratory disorder is not needed because the only evidence indicating such disability is related to

> service is his own general, conclusory lay statements. He asserts he has breathing problems and viruses related to herbicide exposure in Vietnam. However, there is no medical evidence of record regarding a nexus between a current respiratory disability and service, including his presumed exposure to herbicides therein. He has also not alleged a continuity of symptomatology since service. As there is no indication of some causal connection by competent lay or medical evidence, an examination is not warranted. *See McLendon, supra.* VA's duty to assist is met.

(R. at 5 (2-11)).

First, Appellant asserts that the Board "did not provide sufficient reasons for rejecting the evidence of record for purposes of the meeting the "low threshold" as described in the third element of *McLendon*". (App. Br. at 7). However, Appellant has not identified *any* evidence of record reflecting an "indication" or "association" between COPD and service. He does not point to any service treatment record, VA medical record, private medical opinion or credible scientific article to support his claim; instead his assertions are founded solely on his lay statements.

Secondly, Apellant asserts that his reference to an article about herbicide exposure should have been sufficient evidence to trigger the duty to assist under *McLendon* "as it "indicates" there "may" be a relationship between his COPD and herbicide exposure". (App. Br. at 8). (R. at 66-68).

While Appellant does mention an article regarding herbicide exposure in his appeal he never submitted the article to the Board nor offered any information about the date, publication source or author of the article. (R. at 66-68). Appellant contends that he is competent to report medical evidence which

he personally read and argues that it is analogous to the finding in *Jandreau v. Nicholson,* 492 F.3d 1372, 1377 (Fed. Cir. 2007), which held a veteran, is competent to report statements made to him by a physician. (App. Br. at 8). There is nothing in *Jandreau* that evenly vaguely suggests that the Board, or this Court, should give Appellant's lay understanding of an unidentified article, of unknown origins, the same weight it would have given his report of information obtained directly from a trained, medical professional. Appellant's interpretation of *McLendon* would illogically morph the "low threshold" into no threshold.

"The duty to assist is not always a one-way street. If a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence." *Wood v. Derwinski*, 1 Vet.App. 190, 193 (1991). If Appellant wanted the Board to consider the article in question, he had ample opportunity to do so. He did not avail himself of that opportunity and should not now be able to fault VA for his inaction. Consequently, his contention that the Board's decision should have hinged on his interpretation of the article, is meritless and should not be given any consideration.

A Board decision must be supported by an adequate statement of reasons or bases which explains the basis of all material findings and conclusions. 38 U.S.C. § 7104(d)(1). This requires the Board to analyze the probative value of the evidence, account for that which it finds persuasive or

unpersuasive, and explain why it rejected evidence materially favorable to the claimant. *Caluza v. Brown,* 7 Vet.App. 498, 506 (1995). The Board's statement of reasons or bases must simply be sufficient to enable the claimant to understand the basis of its decision and to permit judicial review of the same. *Gilbert v. Derwinski,* 1 Vet.App. 49, 57 (1990).

In the present case, the Board considered Appellant's lay statements and determined:

> The Veteran is competent to describe any discernible symptoms of COPD without any specialized knowledge or training. *Barr v. Nicholson*, 21 Vet. App. 303, 309 (2007). However, his own opinions regarding the etiology of his COPD (relating such to his in-service herbicide exposure) are not competent evidence. He is a layperson, and does not cite to supporting medical opinion or clinical or medical treatise evidence which pertains to his own specific disability picture. Furthermore, the question of the etiology of COPD is a medical question beyond the scope of lay observation. *See Jandreau* 492 F. 3d. at 1372.

(R. at 8 (2-11)). The Board's decision addressed the material issues raised by Appellant and explained its rejection of his lay opinion. (R. at 7-8 (2-11)). It also discussed the applicable laws regarding presumed service-connected conditions due to Agent Orange exposure. (R. at 8 (2-11)). Lastly the Board's decision provided an explanation for its decision that is understandable and facilitative of judicial review. (R. at 8 (2-11)). The Board's statement of reasons and bases for its finding was adequate and there was no error. Appellant's mere disagreement with how the facts were weighed is insufficient in demonstrating error exists.

An appellant must not only demonstrate error in a Board decision but

must demonstrate the harmful and prejudicial effect of that error. *Shinseki v. Sanders*, 556 U.S. 396, 409, 129 S.Ct. 1696, 1706 (2009) (applying the rule of prejudicial error). As the Supreme Court made clear in *Sanders*, any framework that shifts the burden to the Secretary to demonstrate the lack of prejudice of an error is inconsistent with the statutory requirement of 38 U.S.C. § 7261(b)(2) that this Court take due account of the rule of prejudicial error. *Id.* at 414 (rejecting the burden shifting framework created by the Federal Circuit with respect to failure to provide notice as required by the Veterans Claims Assistance Act). *See also id.* at 408 ("We have previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record.").

Therefore, as Appellant has failed to demonstrate any error, prejudicial or otherwise, the Court should affirm the Board's decision.

V. CONCLUSION

Upon review of all the evidence, as well as consideration of the arguments advanced, Appellant has not demonstrated the Board committed prejudicial error in its findings of fact or its conclusions of law. Because Appellant failed to satisfy his burden of demonstrating the existence of a prejudicial error, the Court should affirm the decision on appeal.

Respectfully submitted,

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